

Notice to Missouri River Basin Between Bullwhacker Creek & Musselshell River  
(Basin 40EJ Water Users)

**FILED**  
**SEP 04 2019**

**Montana Water Court**

Square Butte Grazing Association (Square Butte) has filed a Motion to Amend to several elements of Water Right Statement of Claim No. 40EJ 37911-00, including the priority date, the flow rate, the maximum acres and the place of use. A full copy of Square Butte's objection is available on the "Notices & Information" page of the Montana Water Court's website at <https://courts.mt.gov/courts/water>. Interested parties may file a response or objection.

Response and Objection Deadline:

Any response or objection to the motion to amend must be filed with the Montana Water Court, PO Box 1389, Bozeman, MT 59771-1389, within 45 days of the last publication of this notice. Therefore, the filing deadline is November 12, 2019, with a copy mailed to Square Butte Grazing Association, c/o Stuart C. MacKenzie, Burns, Solem & MacKenzie, PO Box 248, 411 Ohio Street, Chinook, MT 59523-0248. Please indicate "Water Court Case 40EJ-80" on any response, objection or other correspondence related to the motion to amend.

By Order of the Montana Water Court dated August 30, 2019.

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BURNS, SOLEM & MACKENZIE  
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Chinook, Montana 59523  
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Attorney for Claimants

**E-MAIL FILED**

**JUL 31 2019**

**Montana Water Court**

**IN THE WATER COURT OF THE STATE OF MONTANA  
MISSOURI RIVER BETWEEN BULLWHACKER CREEK AND  
MUSSELSHELL RIVER – BASIN (40EJ)**

\*\*\*\*\*

**CLAIMANT: Square Butte Grazing Association**

**CASE 40EJ-80  
40EJ 37911-00**

**BRIEF IN SUPPORT OF MOTION TO AMEND**

COMES NOW, Stuart C. MacKenzie, Attorney for claimant, Square Butte Grazing Association, and files this brief in support of amending Statement of Claim 40EJ37911-00 as it pertains to priority date, flow rate, maximum acres and place of use. The claimant seeks to amend their claim as to priority date from an affidavit supporting a use right to an earlier decreed right. The Claim's Examination Rules define a use right as follows:

"'Use Right' means a claimed existing water right perfected by appropriating and putting water to beneficial use without written notice, filing or decree."

In seeking to amend the use right priority date, the claimant must overcome the presumption of validity by a preponderance of evidence but shows the use right statement is mistaken and does not accurately reflect the correct historic use.

Properly filed statement of claim for an existing water right is prima facie proof of its content. See § 85-2-227, MCA. If a claimant seeks to amend its claim, it must overcome that prima facie presumption of validity by demonstrating with a preponderance of evidence that one or more elements of the prima facie statement of claim are incorrect. *Benson v. Hopseker*, Case 76C-A2, 76C 15176-00, 76C15177-00, 2014 Mont. Water LEXIS 11 (2015) (citing *Burkhartsmeier v. Burkartsmeier*, Case 40G-2, 1997 Mont. Water LEXIS 1, Memorandum Opinion and Order Adopting Master's Report (Mar. 11, 1997)).

In seeking to amend a claim to correct a priority date, it is the claimant's burden to prove by a preponderance of the evidence that the amendment to the priority date is necessary to accurately reflect the historical use of the subject claim. See *In re Clark Fork Coal.*, Case 76G-A8, 76G 91008-00, 76G 214587-00, 76G 214588-00, 2014 Mont. Water LEXIS 4, \*16 ("the movant/claimant has the initial burden to prove, by a preponderance of the evidence, that a mistake was made in the original claim filing and that the correct historical use of the claim is accurately reflected by the requested amendment(s)")."

A preponderance of the evidence is "a relatively modest standard that (requires) the statutory criteria are 'more probably than not' to have been met." *Benson v. Hopseker* (citing *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont, 438, 240 P.3d 618).

The affidavit supporting the use right was executed by William Williams on September 24, 1981. In the affidavit he claims a priority date of May 1, 1928, at which time he would have been 8 years old. The affidavit is attached as Exhibit A. A detailed review of this affidavit clearly shows that the priority dates claimed were restricted to events occurring during his lifetime which he remembered. (See Affidavit of his nephew, Dannie Williams attached as Exhibit B). The claim fails to accurately reflect the historic use of the claim, and there is no mention of the name of the appropriator, method of appropriation, or observable facts supporting the Affidavit. Likewise, the minority of William Williams, being approximately 8 years old at the time of the observation makes it questionable.

A second challenge to the claim is established by looking at the ownership of the land in question at the time of the claimed priority date. Ownership of the land was in the name of the Phillips Development Company, which had acquired the claimed property under 37911-00 from Benjamin D. Phillips and his wife Emma Phillips by deed dated October 8, 1920, and included other extensive land holdings.

The priority date of May 19, 1888, is established and found in the District Court Case, 17th Judicial District No. 305. The Plaintiffs were B.D. Phillips and Ruby Gulch Mining Co. Defendants were Luke Deniff, et al, and intervenors were Carl Henson, et al. No less than five law firms represented the various parties.

Judge William A. Clark, Presiding Judge, issued his Findings of Fact, conclusions of law and Decree on May 29 1920. On page 3 and 4 of the Findings of Fact, the Court found as follows:

“a. That on the 19<sup>th</sup> day of May 1888, by means of a ditch designated on the plat as the “Damon” ditch, which ditch taps Warm Springs Creek on its west bank at a point approximately 600 feet west and a short distance south of the northeast corner of the northeast quarter of the northwest quarter of Section 13, Township 24 North, Range 24 East, and diverts to and upon the lands of the plaintiffs 160 inches, statutory measurement, or four cubic feet per second flow, of the waters of said Warm Springs Creek.”

~ and ~

“c. That on the first day of April 1889, by means of a ditch designated on the plat as the “Curry West Side” ditch, which ditch taps said Warm Springs creek a little north of the center of the northeast quarter of the northwest quarter of Section 13, Township 24 North, Range 24 East, and diverts to and upon the lands of the plaintiffs 160 inches, statutory measurement, or four cubic feet per second flow of the water of said Warm Springs Creek.”

The Findings of Fact regarding the appropriations were repeated in the Conclusions of Law.

The next two references refer to the Gill Ranch and will be identical. The Gill Ranch was purchased by B.D. Philips in 1914, and consisted of 720 acres which included 309 irrigated acres described in the Melissa Norris Memorandum.

From an unpublished manuscript titled “Benjamin Daniel Phillips and Family in Montana” by Walter W. Phillips in 1999, the following statement is made on page 83, Paragraph 5:

“I had two years’ experience as manager of the Gill Ranch ... At that time one big problem (as far as I was concerned) was due to the fact that we were still doing all of our work with horse--putting up thousands of tons of hay, farming and keeping the irrigation system repaired...”

Page 94, Paragraph 2:

“1934 was a continuation of dust bowl conditions...My brother Ben, at the Gill Ranch through the early part of the drouth was getting a normal crop of

alfalfa, as his source of water was mainly from Rock Creek, which as mentioned previously, was fed by a big natural spring that flowed normally all through the drouth.” (Mr. Phillips misidentified the creek because the only creek which was fed by a natural spring was Warm Springs Creek.

Claimant has more than met its burden of proof by a preponderance of the evidence that the amendment to the priority date accurately reflects the true historic use of the claim.

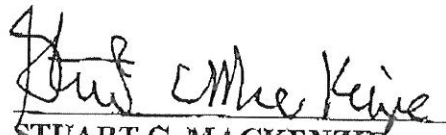
The remainder of this Motion to Amend addresses the amendments to flow rate, maximum acres and place of use.

On April 30, 2019, Melissa Norris forwarded a Memorandum for Case 40LJ-80, claim 40EJ37011-00 to Water Master Andrea Collins. This Memorandum was generated after several discussions between Square Butte Attorney, Stuart MacKenzie and Melissa Norris of the DNRC in Lewistown. The Claimant, Square Butte Grazing Association, adopts the April 20, 2019, Memorandum in its entirety, by reference. This includes the 309 total acres irrigated from Warm Springs Creek and the legal descriptions of the Place of Use. The Water Master also questioned the flow rate of 13.67 cfs, as possibly being excessive. By reducing the number of acres irrigated the flow rate necessary to irrigate the acreage is also reduced. Claimant seeks to amend the flow rate from 13.67 cfs to 8 cfs. Under the Court Decree of May 29, 1920, the Claimant was awarded a total of 8.0 cfs. Using the 17 gallons per minute per acre guideline, the 309 acres would be entitled to 11.70 cfs. Using 8 cfs shows the flow rate to be significantly lower than the guidelines would allow.

Using the partial abstract previously used, the amendments are set forth in Exhibit “C”, attached hereto.

The decreed right of 1888 and the subsequent use of Warm Springs Creek for irrigation overwhelmingly supports the position that a mistake was made by the Williams Affidavit in the original claim filing. The true historic use of the claim is reflected by the amendment of the priority date to May 19, 1888.

Respectfully submitted this 30<sup>th</sup> day of July, 2019.

  
STUART C. MACKENZIE  
Burns, Solem & MacKenzie  
Attorney for Claimant  
Square Butte Grazing Association



AFFIDAVIT

I, WE, William E. Williams  
affiant's name(s)

know that on 5-1-1928 this Ditch was developed and/or  
(date of priority) (ditch, dam, spring, etc.)

put to use on Warm Spring Creek for the purpose of Irrig.  
water source type of use

The point of diversion of this development is located in the:

SE 1/4 SE 1/4 SW 1/4 of Section 12, Township 24N, Range 24E in Phillips County.  
1/4 1/4 1/4 of Section       , Township       , Range       , in        County.

NOTE: If the affiant has additional information concerning the above-described development, please complete as much of the following information as possible:

Flow rate of use:       ; Volume of water used per year:       .  
(GPM or CFS or M.I.) Acre-feet

Place of use:

1/4 1/4 1/4 of Section 13, Township 24N, Range 24E in Phillips County.  
1/4 1/4 1/4 of Section 14, Township 24N, Range 24E in Phillips County.  
1/4 1/4 1/4 of Section 23, Township 24N, Range 24E in Phillips County.  
" 24

REMARKS:       

The above information is to the best of my knowledge.

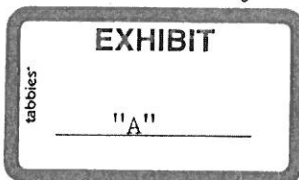
Signature of Affiant W. E. Williams

Subscribed and sworn before me this 24 day of Sept., 19 81

George R. Smith  
Notary Public for the State of Ind.

Residing at Gross Range

My Commission expires Feb. 20, 1983



37911

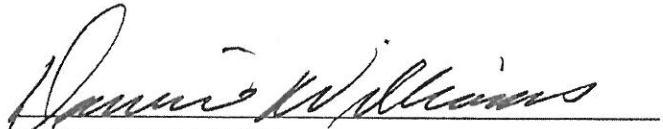


AFFIDAVIT OF DANNIE WILLIAMS

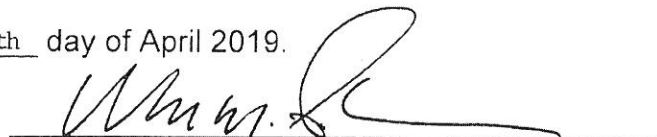
STATE OF MONTANA     )  
                                     : ss.  
County of BLAINE        )

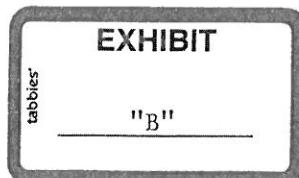
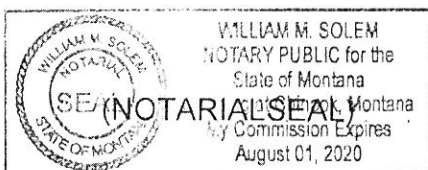
DANNIE WILLIAMS, being first duly sworn upon oath, deposes and says:

1. I am 70 years old, and have been a lifelong resident of Landusky, Montana. I am very familiar with the body of water on the Warm Springs Creek drainage, sometimes referred to as "the plunge". A large volume of water flows out of a hole in the Little Rocky Mountains into a reservoir/dam, and then exits into a large canal. From the time I was a youngster swimming in the plunge until the present time, I have observed the flow of the water.
2. The volume of flow of water coming out of the mountain has been constant and year-round during my many years of observation, with the exception of a short period of time when the flow increased, which appeared to be related to earthquakes in Alaska in 1964. The flow is unaffected by surface precipitation, atmospheric conditions, weather or drought. The source of the water is apparently a deep underground source and has a constant measured temperature of 68°; hence the name Warm Springs Creek.
3. My uncle, Will Williams, was born in 1921 and died in 1982.
4. Further, Affiant sayeth not.

  
DANNIE WILLIAMS

Subscribed and sworn to this 24<sup>th</sup> day of April 2019.

  
Printed Name of Notary: William M. Solem  
Notary Public for the State of MONTANA  
Residing at: Chinook, Montana  
My Commission Expires: 08-01-2020



## EXHIBIT "C"

Claim 40EJ 37911-00

Priority Date: May 1, 1928 May 19, 1888

Enforceable Priority Date: May 1, 1928 May 19, 1888

Type of Historical Right: IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 13.67 cfs 8.0 cfs

\*Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climactic Area: 2 - MODERATELY HIGH

Maximum Acres: 361 309

THE MAXIMUM ACRES CLAIMED MAY BE QUESTIONABLE  
THE SUM OF THE PARCEL ACRES IS 361.

\*Source: WARM SPRING CREEK

Source Type: SURFACE WATER

Point and Means of Diversion:

<u>ID</u>	<u>GovtLot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESESW	12	24N	24E	Phillips

Period of Diversion: APRIL 1 TO OCTOBER 1

Diversion Means: HEADGATE

Period of Use: APRIL 1 TO OCTOBER 1

Place of  
Use:

<u>ID</u>	<u>Acres</u>	<u>GovtLot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
4	130		SE	14	24N	24E	Phillips
2	10		N2NENE	23	24N	24E	Phillips
3	10		S2NE	14	24N	24E	Phillips
4	111		S2	13	24N	24E	Phillips
5	70		N2N2	24	24N	24E	Phillips
TOTAL	361						

<u>AC</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
111	S2	13	24N	24E	Phillips
118	E2	14	24N	24E	Phillips
10	N2NENE	23	24N	24E	Phillips
70	N2N2	24	24N	24E	Phillips
309	Total Acres				